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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: EAC 00 194 53639 Office: VERMONT SERVICE CENTER

Date: 17 JAN 2002

IN RE: Petitioner:  
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. it seeks to employ the beneficiary permanently in the United States as a dinner cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is December 23, 1998. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On September 12,

2000, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage as of December 23, 1998, to include the petitioner's 1998 and 1999 federal tax returns.

In response, counsel submitted a copy of the petitioner's 1999 Form 1065 U.S. Partnership Return of Income which reflected gross receipts of \$649,889; gross profit of \$489,976; salaries and wages paid of \$279,494; guaranteed payments to partners of \$0; depreciation of \$8,265; and an ordinary income (loss) from trade or business activities of \$40. Schedule L reflected total current assets of \$50,318 with \$37,818 in cash and total current liabilities of \$92,803. The director determined that the documentation was insufficient to establish the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits copies of the petitioner's 1998-99 bank statements, a copy of an unaudited statement of revenue and expenses for the period ended December 31, 1999, and a copy of a \$10,300 line of credit for one of the owners of the restaurant.

Counsel argues that the Service failed to credit the non-cash item of depreciation into the company's net income for 1999. Counsel further states that the restaurant did not begin operation until 1999.

Counsel's argument is not persuasive. Counting the \$8,265 figure shown on the tax return for depreciation does not show the petitioner's ability to pay the wage offered as of December 23, 1998.

The unaudited income statement which was submitted as proof of the petitioner's ability to pay the proffered wage is in the record. However, it has little evidentiary value as it is based solely on the representations of management. 8 C.F.R. 204.5(g)(2), already quoted above in part, states that:

Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner.

This regulation neither states nor implies that an unaudited statement may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

A review of the 1999 federal tax return shows that when one adds



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On appeal, counsel submits a brief and additional evidence.

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Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is December 23, 1998. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 per annum.

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This regulation neither states nor implies that an unaudited statement may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

A review of the 1999 federal tax return shows that when one adds

the depreciation and the ordinary income, the result is \$8,305, less than the proffered wage.

Accordingly, after a review of the federal tax return, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.